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No. 88-374

In the Supreme Court of the United States

OCTOBER TERM, 1988

ANGELO RUGGIERO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a mistrial was justified in light of the high likelihood that the jury had been compromised as a result of unlawful conduct attributable to petitioners and the fact that only 11 jurors remained after three were excused when they expressed doubts about their impartiality.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-63a) is reported at 846 F.2d 117. The district court's order granting a mistrial (Pet. App. 66a-87a) is reported at 678 F. Supp. 46. The district court's denial of petitioners' motion to bar a retrial (Pet. App. 88a-143a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1988. A petition for rehearing was denied on June 1, 1988. On August 4, 1988, Justice Marshall extended the time for filing a petition for a writ of certiorari to and including August 30, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Angelo Ruggiero, Gene Gotti, and John Carneglia were charged in a 12-count superseding indictment with engaging in a continuing criminal narcotics enterprise in violation of 21 U.S.C. (& Supp. IV) 848. The indictment also charged them, together with petitioners Edward Lino, Mark Reiter, Joseph LoPresti, Anthony Moscatiello, Oscar Ansourian, Anthony Gurino, and Cesar Gurino, with conspiracy to engage in racketeering, in violation of 18 U.S.C. 1962(d), and with other offenses involving narcotics trafficking and the obstruction of a grand jury investigation. After seven and a half months of trial, the trial court declared a mistrial (Pet. App. 66a-87a). The case was reassigned to another district judge, who denied petitioners' motion for an order barring their retrial on double jeopardy grounds (*id.* at 88a-133a). Petitioners took an interlocutory appeal from that order, and the court of appeals affirmed (Pet. App. 1a-63a).

1. Petitioners' trial began on June 1, 1987, before Judge Mark L. Costantino and an "anonymous" jury.[1] In October 1987, the United States Attorney obtained information from confidential sources that certain of the petitioners had identified members of the anonymous jury for the purpose of influencing the verdict and that one juror had been approached and compromised. Pet. App. 6a-7a. A grand jury began an investigation of the matter (*id.* at 7a).

On December 8, 1987, while that investigation continued, juror Gary Barnes was excused from the jury when it was discovered that he was not a United States citizen.

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[1] Jury selection had begun in April. In order to protect the members of the venire and the jurors who were eventually seated, neither the prosecution nor the defense was advised of their identities.

Two days later, Barnes received a phone call from a co-worker, Melvin Rosenberg. Rosenberg pressed Barnes to meet him. When the two got together later that day, Rosenberg told Barnes that he was a long-time friend of petitioner Gotti and, apparently believing that Barnes was still on the jury, suggested that Barnes could have a BMW automobile if he told Rosenberg how the jury was "feeling." See Pet. App. 7a-8a.

2. On Thursday, January 7, 1988, the government filed an ex parte motion, accompanied by affidavits setting forth the government's information regarding possible jury tampering and reports that four petitioners had previously obstructed judicial and law enforcement processes (Pet. App. 10a-11a). The motion asked the trial court to question the members of the jury in camera concerning whether they had been approached and then to conduct an evidentiary hearing into the possibility of jury tampering. The following Monday, January 11, the trial court examined each of the jurors in chambers outside the presence of all counsel (*id.* at 11a). Except for one juror, who said that someone at work knew that she was on petitioner Ruggiero's jury, none of the jurors admitted to having been approached (*id.* at 12a). Petitioners received the transcript of the jury voir dire and the government's papers the next day (*ibid.*). On January 13, the trial court began a hearing on the jury-tampering issue. Before it began, the government and the defense requested that the hearing be closed to the public (*id.* at 12a). When the court declined to rule on this request, the government moved to sequester the jury (*ibid.*). Petitioners opposed that motion (*ibid.*). Ultimately, the jury was sequestered after the second day of the hearing (*id.* at 18a).

At the hearing, the court received an affidavit from an FBI agent setting forth confidential information that petitioners Carneglia, Gotti, Ruggiero, and Lino had taken

measures to identify members of the anonymous jury in order to fix the case (Pet. App. 73a). According to the affidavit, those defendants had retained a private investigator, William Sewell, to perform computer searches of the license plate numbers of the cars in which the jurors were observed (*ibid.*). After having a falling out with Sewell, these petitioners used a different investigator (*id.* at 6a). The agent's affidavit related that five jurors had been identified and one had been approached and compromised (*id.* at 73a-74a).

Former juror Barnes testified at the hearing and identified Sewell from a photograph as a person he had seen in the courtroom on several occasions (Pet. App. 75a).[2] He also testified about an encounter with Sewell, who once followed him into a parking lot that was used by several of the jurors (*id.* at 14a, 75a-76a).

Barnes worked at REFCO, a brokerage house that records its employees' phone calls in the regular course of its business. At the hearing, the government introduced a recording of the telephone call placed to Barnes by Rosenberg, who also worked at REFCO (Pet. App. 77a, 14a-15a, 36a-39a). After Rosenberg identified himself, he asked Barnes to meet him. When Barnes asked Rosenberg what he wanted to talk about, the conversation continued (*id.* at 37a-38a):

> Rosenberg: No, no, no, not on the phone. I want to talk to you.
>
> Barnes: You want . . . I tell you what, can I call you back from the pay phone?
>
> Rosenberg: I won't speak to you on the phone.

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[2] On one occasion, Barnes saw Sewell speaking with petitioner Gotti's attorney (Gov't C.A. App. 62, 127-128).

> Barnes: Uh?
>
> Rosenberg: I won't speak on the phone. This phone is taped here.

Barnes saw Rosenberg later in the day. After again refusing to explain what he wanted to talk about, Rosenberg took Barnes to a small conference room and began to press him about "a case in Queens," asking Barnes "how the jury [was] feeling" (Pet. App. 16a). Barnes said that he was not on jury duty in Queens, but rather in Brooklyn (*ibid.*). Rosenberg persisted, Barnes continued to profess ignorance, and the conversation continued (*id.* at 16a-17a):

> Rosenberg said, "I am just going to give you initials, right, and this case is about drugs. * * * Initial is G.G." Barnes reiterated that he was not on a jury in Queens. Rosenberg said, "Okay, okay, Gene Gotti." Again Barnes said, "I don't know what you are talking about. I am not in Queens." Rosenberg said,
>
> > I have known this kid for 42 years. I have known his family. We are good friends. I know his three daughters and everything. I just want to know what the jurors are thinking. I know this guy is probably going to get convicted, going to go to jail. . . . [T]he Government is probably going to try to put this guy away for a long time because of his brother.
>
> Rosenberg then mentioned a new BMW and asked [Barnes] what kind of car he drove. Barnes said that he did not need a car and walked out of the room.

Barnes testified that he had not told Rosenberg that he was serving on the jury in the Gotti case (*id.* at 17a).

An FBI agent testified that he had questioned Rosenberg on December 22. Rosenberg admitted speaking with Barnes, but said it was "a lark." He denied mentioning the

initials "G.G." or the name "Gene Gotti," and he claimed that he did not know Gene Gotti other than from the newspapers (Pet. App. 8a, 79a). Rosenberg also told the agent that he and Barnes were extremely close, like father and son (*id.* at 18a). Barnes testified, by contrast, that he and Rosenberg were not close friends, but had only met casually in the halls and spoken once or twice on the phone about orders at REFCO (*id.* at 15a). The transcript of their earlier phone conversation reflected that Barnes did not recognize Rosenberg until after the latter had identified himself (*id.* at 77a). At the end of the interview, the agent served Rosenberg with a subpoena requiring him to appear before the grand jury the following day.

The government introduced recordings of several of Rosenberg's phone conversations on the day he was served with the subpoena. In those conversations, Rosenberg, again expressing a reluctance to explain his purpose while on the phone, spoke with attorney Charles Carnesi and arranged for Carnesi to contact a second attorney, Brian Levinson. The calls suggested that Carnesi was to orchestrate—in Rosenberg's words, "lay out the groundwork" for—Rosenberg's appearance before the grand jury, while Levinson would accompany him (Pet. App. 9a-10a; see *id.* at 81a). Carnesi had earlier represented William Sewell before the grand jury.[3] When interviewed by the FBI, hours before speaking with Carnesi on the phone, Rosenberg claimed that the only lawyers he knew were his brother-in-law and Levinson (*id.* at 8a).

On the third day of the hearing, the trial court reexamined the jurors individually in open court. During

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[3] Sewell had discussed his subpoena with petitioner Ruggiero at the Metropolitan Correctional Center, while Carnesi was present (C.A. Jt. App. A230-A235). When interviewed by the FBI, Rosenberg denied knowing Sewell (Gov't C.A. App. 151-152).

that voir dire, three jurors expressed doubts about their ability to remain impartial (Pet. App. 18a). Juror No. 4 reported that his father had seen a press report of the hearing and had expressed concern to him about it; the juror said that "at this point [I] don't know whether I can be impartial" (*id.* at 43a-44a).[4] Juror No. 8 admitted that he had learned of the allegations of jury tampering. He stated that he could not be impartial "on the subject of drugs based on immediate family experiences involving my children and so forth" (*id.* at 18a-19a, 45a, 49a). Juror No. 12 stated that it would be difficult for her to be impartial because she had "put pieces together" (*id.* at 19a, 51a-52a).

3. At the government's request, the judge withheld decision on what course to follow until after the parties had had an opportunity to file memoranda. On January 19, the government moved for a mistrial. It argued that Juror No. 4, Juror No. 8, and Juror No. 12 had to be excused, and it asked that the court make a finding that there was a "manifest necessity" for a mistrial because the dismissal of those jurors would leave too few jurors to proceed further and because petitioners had tampered with the jury (Pet. App. 19a). Petitioners filed a joint memorandum which agreed that "circumstances 'necessitated [the] dismissal' of Jurors 4, 8, and 12" (*id.* at 20a), but opposed the findings sought by the government.

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[4] That juror had previously asked to see the judge and had volunteered that his father had recounted press reports of the trial and "got very nervous when he heard that the defendants might know who we are" (Gov't C.A. App. 161). Juror No. 4 also said that his mother had the "same attitude" and that both his parents were "panicked" (*ibid.*). He also said that he felt "that if our anonymity has been broached [*sic*] we are in a certain amount of danger, and whether or not that would affect my decision I don't know. * * * Personally it wouldn't bother me. Again, I have a family, and I live right in the neighborhood where most of these things happened" (*ibid.*).

4. On January 21, the United States District Court for the Eastern District of New York convened en banc to consider petitioners' allegations that the United States Attorney, believing that the government was losing at trial, had made charges of jury tampering to force a mistrial (Pet. App. 20a).[5] The court ordered the government to produce the minutes of the grand jury, reviewed the record of the proceedings before the trial judge, and heard oral argument. The en banc court found that the grand jury proceedings were bona fide, and that the United States Attorney had good reason to bring the jury tampering allegations to the trial judge's attention (*id.* at 20a-21a). The court also concluded that any publicity that resulted from the government's application was not the fault of the United States Attorney (*id.* at 21a). The court left to the trial judge the questions whether and when to order a mistrial (*ibid.*).

5. The trial court declared a mistrial (Pet. App. 66a-87a). After recounting the course of the proceedings before it, the court indicated that it would apply the standard of proof set out in *United States* v. *Mastrangelo,* 662 F.2d 946 (2d Cir. 1981), cert. denied, 456 U.S. 973 (1982). In that case, in which an essential witness had been murdered on the way to court, the Second Circuit had stated that a mistrial could be granted if the trial judge "reasonably concludes that there is a distinct possibility that the defendant participated in making the witness unavailable, at least * * * where the Government is totally without fault and the case cannot proceed and the ends of justice be served * * *" (Pet. App. 68a). In light of the

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[5] Petitioners had raised these allegations in proceedings before Judge Costantino, and counsel for petitioner Gotti had repeated them in a television interview before the jury was sequestered (Gov't C.A. Br. 13).

"exigency of determining whether to proceed with the trial and the obvious constraints placed upon [its] ability to fully explore" allegations of jury tampering at a short hearing, the trial court saw "no reason to depart from the standard enunciated in *Mastrangelo*" (*id.* at 69a). It also rejected petitioners' contention that the jurors' answers during voir dire precluded a finding of jury tampering (*id.* at 70a).

The trial court adopted the en banc court's ruling on the question whether the government had acted in bad faith in seeking a mistrial (*id.* at 71a). It declined to make a determination concerning the weight of the evidence of petitioners' guilt or innocence of the crimes charged in the indictment, stating only that the severity of the charges and the possible sentences they carried provided petitioners with "ample motive to tamper with the jury" (*id.* at 72a).

Turning to the merits of the jury tampering issue, the court found (*id.* at 72a):

> Based upon the evidence adduced at the hearing and the materials submitted by the Government, the Court finds that there is a very high degree of likelihood that the panel sitting on this case has to some extent been compromised as a result of unlawful conduct circumstantially attributable to the defendants.

The trial court next reviewed the evidence introduced at the hearing, rejecting in detail various factual contentions advanced by petitioners. Specifically, it found ex-juror Barnes to be "completely trustworthy" (*id.* at 74a), rejected Rosenberg's account of his relationship with Barnes and the tenor of their conversation (*id.* at 79a-80a), and found that it was "evident * * * that [Rosenberg] was acting on behalf of Gene Gotti when he contacted Gary Barnes" (*id.* at 80a-81a). The trial court held that "there is

a manifest necessity to declare a mistrial in this case due to the defendants' efforts to improperly identify and influence the jury" (*id.* at 81a-82a).

The trial court also found that there was manifest necessity for a mistrial "because there is an insufficient number of jurors who can deliberate fairly and impartially" (Pet. App. 82a). The court explained that it believed the statements of Juror No. 4, Juror No. 8, and Juror No. 12 that "they could no longer remain fair and impartial" and that with their dismissal there remained an insufficient number of jurors to proceed further (*id.* at 82a-83a).

6. Following the mistrial, the case was reassigned to Judge Joseph M. McLaughlin. Petitioners moved for an order barring their retrial on double jeopardy grounds. The district court denied that motion (Pet. App. 88a-143a). With respect to the jury tampering issue, the court refused to "second-guess" the trial court's use of the *Mastrangelo* standard and rejected various challenges to the trial court's findings of fact (Pet. App. 114a-118a). It found the trial court's finding that there had been "manifest necessity" for a mistrial on this ground to be "fully justified" (*id.* at 118a). Similarly, after reviewing the transcript of the voir dire, the district court concluded that "[g]iving Judge Costantino's determination the deference it deserves, [it could] perceive no abuse of discretion in his conclusion that the jurors had now lost their impartiality and had to be excused" (*id.* at 121a). The district court also relied on the fact that the defendants "conceded as much in their post-hearing memorandum," which "as a practical matter," left the trial court "with no alternative but a mistrial" (*id.* at 121a, 122a). The district court rejected contentions that the government or Judge Costantino had been responsible for the circumstances leading up to the mistrial (*id.* at 123a).

Finally, the district court rejected the argument of certain of the petitioners, advanced for the first time in their separate memorandum, that the trial court should have allowed the trial to continue with an 11-person jury and that allegations of misconduct directed at other petitioners did not warrant a mistrial as to them (Pet. App. 124a-127a). The option of an 11-person jury was not available, the district court explained, because Fed. R. Crim. P. 23(b) requires all parties to stipulate in writing with the court's approval to a jury with fewer than 12 members, none of the defendants had tendered or even proposed such a stipulation, and the government was unlikely to have joined one in any event (*id.* at 126a).

7. The court of appeals affirmed by a 2-1 vote (Pet. App. 1a-63a). It upheld the trial court's use of the *Mastrangelo* standard, explaining that its rationale—"namely, to avoid a mini-trial which could last weeks or months and maximize the risk of alerting the jury to the allegations of misconduct"—was applicable to allegations of jury tampering (Pet. App. 27a). The court agreed with both district judges that "the evidence did raise a 'distinct possibility' that [petitioners] had identified several of the anonymous jurors and had tried to influence one or more of them" (*id.* at 28a).

While characterizing the question as a "closer one," the majority also held "that the [trial] court properly dismissed the three jurors, especially when we weigh their responses to the court's questions in light of the evidence of jury tampering" (*id.* at 29a-30a). Further, it ruled that once those jurors were dismissed, the trial court could properly find that a mistrial was necessary (*id.* at 31a-32a). Like the district court, the court of appeals relied on the fact than none of the petitioners had suggested that the case could proceed with fewer than 12 jurors until after the jury had been discharged and that the government would

have been unwilling to agree to that course (*id.* at 32a-33a). Finally, the majority rejected the claim that certain of the petitioners, those not specifically charged with jury tampering, were entitled to have their trial continue and also held that petitioners' allegations of prosecutorial misconduct were not sufficiently colorable to warrant a hearing on the prosecution's motives (*id.* at 34a-35a).

Judge Lumbard dissented (Pet. App. 53a-63a). In his view, the responses of Juror No. 4, Juror No. 8, and Juror No. 12 fell short of providing a basis for disqualifying any of them (*id.* at 55a). It was the trial court's duty, Judge Lumbard stated, to urge the jury "to continue to serve and to consider the case solely on the evidence" (*id.* at 55a, 58a). Judge Lumbard also criticized the trial judge's decision to examine the jurors in open court (*id.* at 55a; see *id.* at 58a). While acknowledging that "it [was] doubtful whether the defendants would have agreed" to proceed with an 11-person jury, he also maintained that the trial judge had not taken "every reasonable step" to continue the trial on that basis (*id.* at 62a). With respect to the issue of jury tampering, Judge Lumbard concluded that there was "no showing that any remaining member of the jury had been tainted or even approached" (*ibid.*). The combination of these factors and "the judge's remarks about his displeasure regarding the trial" led Judge Lumbard to the conclusion that there "was no showing of 'manifest necessity' to justify the declaration of a mistrial" (*ibid.*).[6]

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[6] Petitioners Ruggiero, Carneglia, and Gotti were retried earlier this year, but their trial ended in a mistrial after the jury was unable to reach a verdict. Retrials for all petitioners are scheduled for early next year.

ARGUMENT

The court of appeals found that there were two sufficient grounds for a mistrial in this case—a "very high degree of likelihood" of jury tampering attributable to the petitioners and the need to excuse three jurors who questioned their own impartiality. Both holdings conform to this Court's prior decisions and the balance they strike between a defendant's right to have his trial completed before a single jury and "the public's interest in fair trials designed to end in just judgments." *Wade* v. *Hunter,* 336 U.S. 684, 689 (1949). Petitioners' challenges to the trial court's factual findings and its decision to declare a mistrial do not raise any issue of general importance requiring further review.

1. As all of the courts below acknowledged, a prosecutor "must demonstrate 'manifest necessity' for a mistrial declared over the objection of the defendant." *Arizona* v. *Washington,* 434 U.S. 497, 505 (1978). Although the government's burden under this standard "is a heavy one" (*ibid.*), it must be applied in light of the particular facts before the trial court (*id.* at 506). For that reason, the application of the "manifest necessity" standard is committed, for the most part, to the trial judge. "[T]he overriding interest in the evenhanded administration of justice requires that [an appellate court] accord the highest degree of respect to the trial judge's evaluation of the likelihood" that one or more jurors' impartiality has been affected by events in a trial (*id.* at 511).

It is difficult to imagine a circumstance that more clearly justifies a mistrial than an attempt to tamper with a sitting jury. Jury tampering denies the prosecutor his "one full and fair opportunity to present his evidence to an impartial jury." *Arizona* v. *Washington,* 434 U.S. at 505. The trial court found that there was "a very high degree of

likelihood that the panel sitting on this case has to some extent been compromised as a result of unlawful conduct circumstantially attributable to the defendants" (Pet. App. 72a).

That finding of fact was not "the bootstrapping of innuendo upon suspicion" (Pet. 39). Rather, as both district judges who heard this matter and the court of appeals found, it was based, inter alia, on: (1) evidence that ex-juror Barnes had been approached by Rosenberg who, acting on behalf of petitioner Gotti and believing that Barnes was still on the jury, had offered him a BMW in return for information about how the jury was "feeling" (Pet. App. 8a, 14a-17a, 78a-79a); (2) proof that Rosenberg had attempted to conceal the purpose of his approach to Barnes and had fabricated an account that misstated the nature of his relationship with Barnes, the substance of their conversation, and the seriousness of his intentions (see *id.* at 8a-9a, 18a, 79a-80a); and (3) information from confidential sources, corroborated to a substantial extent, that petitioners had employed private detectives to breach the anonymity of the jury and had compromised at least one juror (*id.* at 6a-7a, 73a-74a). Against that background, the trial court was not bound by the fact that no sitting juror confirmed that he or she had been approached. As the court of appeals observed, "it is not likely under the circumstances of this case that a juror who had been approached would admit it in open court" (Pet. App. 31a).

Petitioners also challenge the reliance of the courts below on the Second Circuit's prior decision in *United States* v *Mastrangelo, supra.* They argue that the reasoning of that case is not applicable here and that applying the *Mastrangelo* standard in this case "eviscerate[s] the manifest necessity requirement" (Pet. 38-54). We submit that *Mastrangelo* properly describes a trial court's discretion to apply the "manifest necessity" standard in a par-

ticular category of exceptional cases. As the Second Circuit explained, *Mastrangelo* addresses the situation in which a trial judge faced with facts tending to establish a fundamental assault on the fairness of a trial cannot, as a practical matter, "reach any well-founded determination about the true course of events in an hour, a day, a week, or even a month." 662 F.2d at 951. In that situation, when a judge's discretion to declare a mistrial must be exercised without extended factfinding, he may act on the basis of a "distinct possibility" that the fundamental fairness of the proceeding has been subverted by the defendants, "at least where * * * the Government is totally without fault" and "the ends of justice [would] be served" (*id.* at 952).

The circumstances justifying the use of the *Mastrangelo* standard were all present in this case. Jury tampering is a direct assault on the judicial process that requires an immediate response. It would have been totally impracticable for the court to conduct plenary hearings to resolve the questions raised by the government's evidence while reserving the option of proceeding with the trial. As it was, the trial was interrupted for nearly two weeks. Contrary to petitioners' argument (Pet. 44-48), the fact that the government's investigation of attempts to tamper with the jury had begun by October and had not been completed by January did not make *Mastrangelo*'s analysis inapplicable. Once the government had investigated the approach to ex-juror Barnes, which confirmed that efforts were being made to influence the jury, it would have been inconsistent with the government's responsibilities to the proper administration of justice to withhold that information from the court. The court, in turn, was entitled to act expeditiously, rather than to continue putting itself, the witnesses, and the jurors through a trial that had been irrevocably tainted. As in *Mastrangelo,* therefore, the "ends of justice" compelled a prompt response. Finally, as the en banc district court concluded, the government was "totally without fault" in the matter.

There is no inconsistency between *Mastrangelo* and any decision of this Court. The Court has repeatedly rejected the suggestion that "manifest necessity" is a rigid standard, to be applied in accordance with its dictionary definition (see Pet. 50-53). For instance, in *Arizona* v. *Washington, supra,* this Court explained that, "contrary to the teaching of Webster" (434 U.S. at 506),

> those words ["manifest necessity"] do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge.

Accord *Illinois* v. *Somerville,* 410 U.S. 458, 462 (1973) ("manifest necessity" standard "abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial"). Moreover, the Court has emphasized that the principles underlying the manifest necessity standard "command courts in considering whether a trial should be terminated without judgment to take 'all circumstances into account' and thereby forbid the mechanical application of an abstract formula. The value of [these] principles thus lies in their capacity for informed application under widely different circumstances without injury to defendants or to the public interest." *Wade* v. *Hunter,* 336 U.S. at 691. These principles do not establish any precise standard of proof that was violated in this case.

The decisions of the courts below respect the balance of values underlying the "manifest necessity" standard. "[A] defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Wade* v. *Hunter,* 336 U.S. at 689. When there is a "high likelihood" or "distinct possibility" that the fact-

finder has been compromised, as was shown in this case, the public's interest in a fair trial justifies terminating the first proceeding and starting anew.

Apart from the merits, there are several persuasive reasons why this case does not warrant further review. Contrary to petitioners' suggestion that the "distinct possibility" standard threatens to become "a matter of general application" (Pet. 49), it apparently has been applied only three times in this decade—all in the Second Circuit.[7] Those cases were truly extraordinary; they involved, respectively, the murder of a government witness on his way to court, a death threat that led a witness to refuse to testify even after he was jailed for contempt, and an attempt to tamper with a sitting jury. To our knowledge, no other court has ever questioned *Mastrangelo*'s reasoning or its application to these kinds of exceptional circumstances. Since the Second Circuit has applied the *Mastrangelo* standard only in extraordinary cases involving direct attacks on the administration of justice, there is no need for this Court to address the hypothetical question whether that standard should be applied more broadly. Indeed, even if a "distinct possibility" of jury tampering is insufficient to justify mistrial, the finding in this case—that there was a "very high degree of likelihood that the [jury] sitting on this case has to some extent been compromised as a result of unlawful conduct circumstantially attributable to the defendants" (Pet. App. 72a)—met an even higher standard that is consistent with any reasonable view of "manifest necessity."

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[7] In addition to *Mastrangelo* and this case, in *United States* v. *Khait*, 643 F. Supp. 605 (S.D.N.Y. 1986), the government's principal witness refused to testify when his wife received a death threat on the eve of trial. A jury was sworn so that the witness could be held in contempt. When he persisted in refusing to testify, the judge released him and held, relying on *Mastrangelo*, that the defendant could be retried.

2. Even if this Court concluded that the existence of jury tampering was not sufficient to justify a mistrial in this case, there is an alternative ground that supports the decision below—the finding that three jurors had to be excused because their impartiality was in doubt and the trial could not continue with fewer than 12 jurors. The court of appeals held that the district court "properly dismissed" the three jurors who expressed doubts about their impartiality and that "it properly could find that a mistrial was necessary from the number of jurors remaining" (Pet. App. 29a, 31a-32a). That finding, which would justify petitioners' retrial regardless of any disposition of the jury tampering matter, is factbound and plainly unworthy of further review in this Court.

All three of the jurors in question expressed doubt about their ability to act impartially. The trial court heard them personally and was in the best position to evaluate the depth of their misgivings. Under these circumstances, the "compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias" are fully applicable. *Arizona* v. *Washington*, 434 U.S. at 513-514. As this Court explained there (*ibid.*):

> [The trial judge] has seen and heard the jurors during their *voir dire* examination. He is the judge most familiar with the evidence and the background of the case on trial. * * * In short, he is far more "conversant with the factors relevant to the determination" than any reviewing court can possibly be. See *Wade* v. *Hunter*, 336 U.S. 684, 687.

Accord *Gori* v. *United States*, 367 U.S. 364, 368 (1961) (trial judge is "best situated intelligently to" consider whether circumstances require a mistrial). These principles preclude second-guessing the trial court in this case. While

Judge Lumbard expressed the view that "obviously uneasy jurors" might view the voir dire as a "way out" (Pet. App. 59a-60a), it was just as likely that the jurors might understate their concerns. They had taken an oath to be impartial and, after more than seven months of trial, might well have believed that they would be criticized for expressing doubts about their ability to continue. Juror No. 4 in particular could well have been reluctant to elaborate fully on his family members' feeling that, if their identities were known, they would be "in a certain amount of danger" (Gov't C.A. App. 161). The trial judge was the only one to observe the jurors and was best situated to interpret their responses. His judgment is entitled to great deference.

Nor is there support in the record for the suggestion that the jurors' responses were the product of being examined in open court. Although both parties suggested conducting their voir dire in chambers, the trial court was under no duty to do so. The transcript of the voir dire does not suggest that any juror was intimidated by the public nature of the proceedings or would have answered any differently in chambers than he or she did in open court.

In this Court, petitioners contend that the trial court failed to explore adequately alternatives to excusing the three jurors and declaring a mistrial. However, in the trial court, petitioners specifically requested that those jurors be excused and thereby abandoned other possible alternatives. After examining the jurors for the second time, the court withheld decision until after receiving submissions from both sides. In the conclusion of their joint memorandum (C.A. Jt. App. A344), petitioners stated, "Jurors 4, 8, and 12 should be excused." [8] Even though it was

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[8] Petitioners joined this request with an argument that the jurors' inability to serve further was the result of misconduct by the judge and

obvious that this relief would reduce the jury to only 11 members, petitioners nowhere suggested that they would be willing to go forward with fewer than 12 jurors. Indeed, given the facts that this alternative could not have been chosen without the government's consent and that the government was seeking a mistrial on the ground of jury tampering, it would not have been a violation of petitioners' rights to reject that course even if petitioners had proposed it. Petitioners cannot now claim that the district court abused its discretion by failing to take steps that they themselves chose not to request.[9]

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the government, saying that if the dismissal of the jurors led to a mistrial, a retrial would be barred (C.A. Jt. App. A336-A343). Their objective was obviously to have the best of both worlds—to put themselves in a position to argue, if the judge chose not to dismiss the jurors, that they had objected to their presence on the jury, while preserving at the same time the contention that they were not parties to a request for a mistrial. Even accepting the proposition that petitioners could both seek the dismissal of the jurors and contend that a mistrial necessitated thereby was "over their objection" for purposes of their double jeopardy arguments, petitioners cannot now be heard to argue that the trial judge erred by failing to consider alternatives that they did not advocate.

[9] The petition asserts that "the defense asked Judge Costantino to resolve by curative instructions the unease of the jurors * * * about their continued ability to serve," including telling them about the "cost of a re-trial to all parties" (Pet. 25). There is no citation supporting this statement, and it completely mischaracterizes two brief and ambiguous interjections by one attorney—"[i]t is something [that can be] cure[d]" and "If you can cure it * * * "—during a colloquy on whether *one* juror (No. 12) should be further examined (C.A. Jt. App. A297-A298). Immediately thereafter, the trial court acquiesced in the government's request for an opportunity to file a memorandum before the court acted. Petitioners' lengthy memorandum nowhere mentioned the possibility of curative instructions and expressly consented to dismissal of all three jurors (*id.* at A301-A344). See also *Arizona* v. *Washington*, 434 U.S. at 511 (trial judge has discretion to decline to give cautionary instruction).

Nor is there any merit to the suggestion in the petition, based on isolated excerpts from the transcript, that the trial judge acted precipitously or from personal motives. See Pet. 17.[10] As the record reflects, the judge conducted a three-day hearing into the issue of jury tampering. He carefully examined the jury twice in terms that were calculated to uncover possible bias while preserving its neutrality if possible. He discharged the three jurors in question and declared a mistrial only after receiving written submissions from both sides. His findings of fact were thorough and his decision was justified with specific reference to the requirement of "manifest necessity" (Pet. App. 81a-83a). Nothing in this record suggests that the trial judge acted "irrationally or irresponsibly." *Arizona* v. *Washington,* 434 U.S. at 514.

3. Finally, petitioners rely heavily on Judge Lumbard's dissenting opinion (Pet. 31-37). He would have held that the government did not establish "manifest necessity" for a mistrial, believing that there was no showing that any sitting member of the jury had been approached improperly, and that the trial judge mishandled the voir dire and failed adequately to investigate alternatives to a mistrial. For present purposes, however, the

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[10] This lengthy trial was unusually rancorous. In an earlier decision upholding petitioner Ruggiero's citation for contempt arising from a courtroom outburst, the Second Circuit described it as a "tense and volatile multi-defendant criminal trial, in which the district court had been forced on other occasions to warn the defendants to stop interrupting witnesses, using foul language, or otherwise showing their disrespect for the proceedings." *United States* v. *Ruggiero,* 835 F.2d 443, 444-445 (2d Cir. 1987). In any event, the issue is whether the record reflects a diligent effort by the trial judge to apply the "manifest necessity" standard to the particular facts before him, with due regard for the values it reflects. Nothing in the excerpts marshaled by petitioners suggests that he did not.

important point is that the dissenting judge's disagreement with the majority was not on the merits of the legal standards applied by either of the district judges or the court of appeals. Rather, it was over the application of those standards to the particular facts of this case. The fact that this case presented close questions below, as the majority acknowledged (Pet. App. 29a), is not enough to justify further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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